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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1925**

## No. 306

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
PLAINTIFF IN ERROR,

v.

ANNIE NIXON, ADMINISTRATRIX, &c.,
DEFENDANT IN ERROR.

## REPLY BRIEF OF PLAINTIFF IN ERROR

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## REPLY BRIEF OF PLAINTIFF IN ERROR

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The recovery in this case being for an amount ($12,000.00) permissible only under the Federal Employers Liability Act, all questions affecting the rights of a licensee are irrelevant. The Federal act provides but one status for the decedent at the time of his injury, namely, an employee engaged in interstate commerce, and unless the decedent comes within the terms of the Act the verdict cannot be sustained.

The Supreme Court of Appeals of Virginia, however, sustained the recovery on the ground that the decedent was a licensee, and found it unnecessary to pass upon the defenses relied upon, namely, (1) that the defendant company owed the deceased, a track employee, no duty of lookout, and (2) that

the deceased assumed the risk of injury by passing trains operated without a lookout for him, the court saying,

> "Any discussion of the aforesaid positions, or the authorities cited in support thereof would be irrelevant, and therefore will not be entered upon."

If we are correct in our view that this verdict can only be sustained on the ground that the deceased was an employee engaged in interstate commerce, the foregoing defenses must be passed upon in determining the liability of the defendant.

1. The plaintiff in error owed no duty to the deceased, a track repairer employed in interstate commerce, to maintain a lookout for him, or to warn him of the approach of trains.

In addition to the authorities on this point cited and relied upon by the plaintiff in error in its petition and brief, see also,

*C. N. O. & T. P. Ry. Co* v. *Jones'* Admr. (Ky. 1916), 186 S. W., 897;

*L. & N. RR. Co.* v. *Vaughan* (Ky. 1924), 263 S. W., 721;

*Carter* v. *St. L. & S. F. Ry. Co.* (Mis. 1923), 249 S. W., 124;

*Watts* v. *P. M. Ry. Co.* (Mich. 1925), 203 N. W., 859.

In the case of *C. N. O. & T. P. Ry. Co.* v. *Jones' Admr., supra*, Jones was an employee, engaged in repairing the main line tracks of the railroad company under the direction of a foreman. While attempting to get out of the way of a passenger train, which approached without warning, he was struck and killed. Recovery was sought on the ground that the deceased was given no warning of the approaching train. The court disposed of this as follows (page 899):

> "It is true ordinarily that the employees of a railroad, while engaged in operating trains do not owe any duty of keeping a lookout nor of giving signals of approach nor of reducing the speed of the trains in anticipation of finding upon the track the employees, whose duty it is to keep the track in condition and free from obstacles which might

endanger the safety of the train and to watch for and know the time of the passing of the train. To such employees the trainmen owe the duty of exercising ordinary care to prevent injuring them when they are discovered in situations of danger only."

In the case of *L. & N. RR. Co.* v. *Vaughn*, *supra*, an employee was injured by being struck by a passenger train while riding on a handcar for her own convenience with the permission of the company. The plaintiff based her claim for damages on the ground that the permissive use of the handcar by the employee imposed a duty upon the railroad company of maintaining a lookout for such employees. The court disposed of this contention as follows (page 722):

"It is not every employee, much less licensee, that is entitled to be warned of approaching trains. The standard of care in this respect must be measured by the requirements of ordinary prudence in the practical operation of a railroad. The theory of the law is that the company owes precautionary duties to those whose presence is known or should be anticipated at a particular time and place. Without determining the precise relation which the occupants of the car bore to the company at the time of the accident, it is clear that they were out on the track without the knowledge of those in charge of the engine, or of any official whose duty it was to inform the engineer of their presence. Manifestly, it would seriously interfere with the operation of trains if mere knowledge of the custom of employees to use hand cars in going for their checks whenever it suited their convenience required the company always to be on the lookout for such employees, to have its trains under control, and to give reasonable warning of their approach. Therefore, as between the company and employees using hand cars for the purpose indicated, the more reasonable and practical rule, as well as the one fraught with less danger to human life, is to place upon such employees, who have the means of ascertaining when trains are approaching, the duty to keep a lookout and take the

> necessary precautions to keep out of the way of trains, not only for their own protection, but for the protection of those on the trains, rather than on the company which has no means of knowing at what particular time such employees may decide to make the trip."

In the case of *Carter* v. *St. L. & S. F. Ry. Co., supra*, the Missouri Supreme Court confirmed its former opinion on this point set forth in plaintiff's brief and held that "a man working on the track of the railroad must know that trains pass over the track and must look out for them and take care of his own safety."

In the case of *Watts* v. *P. M. Ry. Co., supra*, a section man was killed while operating a handcar on the mainline of the railroad, and the decisive question in the case was that now before the court, whether the railroad company owed the railroad man a duty of lookout.

The court decides this question as follows (page 860):

> "The question so presented is not new. There runs through plaintiff's claim and argument the vein of the humanitarian doctrine and while this is quite appealing in a broad sense, it overlooks the fact that this doctrine avails little unless it appears the peril of the section hand was discovered in season to have averted injury to him."

2. The deceased, a track repairer employed in interstate commerce, assumed the risk of injury from trains operated without a lookout for him:

On this point the Supreme Court of Michigan, in the case of *Watts* v. *P. M. Ry. Co., supra*, held that section men assumed the risk incident to the running of trains without warning, and cited in support of that proposition, the extract from Elliott on Railroads, quoted on page 22 of the plaintiff in error's brief.

This point has recently been decided in the case of *Gilmer* v. *Y. & M. V. Ry. Co.* (C. C. A. 1925), 4 Fed. (2d), 963

(certiorari denied). There the deceased who was a flagman on an interstate railroad was struck and killed while crossing the yards of the company at the end of his run by being struck by a shifting freight car. Negligence was claimed as to the method of shifting cars and in the company's failure to have the yard properly lighted, while defense was made that Gilmer's death was due solely to his own negligence and to an assumed risk of employment.

The court sustained the defense of assumption of risk, holding it to be immaterial whether the company was negligent or not.

> "Plaintiff's intestate was an experienced railroad employee and the conclusion is inescapable that he was thoroughly familiar with the custom of the yard to switch cars without requiring them to be provided with a lookout or to have lights upon them so as to furnish warnings of danger. He was bound to know from his experience that the precautions against injury now insisted upon did not prevail in defendant's yard and that it might be expected at any time, day or night, that a car would be moved without warning of any kind. . . . In *Boldt* v. *P. R. Co.*, 245 U. S. 441, 62 L. ed. 385, a case quite similar to this it is said: 'At common law the rule is well settled that a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him'." (Page 964.)

The case of *S. A. L. Ry. Co.* v. *Koennecke*, 239 U. S., 352, cited by the defendant in error, was not a case of a main line track repairer, but of a "switchman" performing duties in the railroad yard, and is not in point.

In the case at bar there was no violation of a statutory requirement, or failure of compliance with any orders or rule of the plaintiff in error, adopted for the safety of employees. There was no rule requiring the engineman and fireman to keep

a lookout for track men. Record (print), pages 66-68. On the contrary there could be no rule requiring a lookout for track men, because it would be impossible to know when, or where to look for them. Record (print), pages 173-174.

The uncontradicted evidence was that section men were instructed to keep a constant lookout for their own protection against passing trains. The plaintiff's intestate, an experienced section man, knew this, and such were the instructions given by him to the section men employed under him.

The witness Rose, one of the section force, testified as follows:

> "Q. What instructions did Mr. Nixon give you, if any, in respect to the section men looking out for trains?
>
> A. He would caution us, and tell us to look out for trains; to be very particular about that, and for some one to watch one way and some the other.
>
> Q. Did you all understand that trains might come along the track at any time?
>
> A. Most any time.
>
> Q. Was that your experience, that trains would come along the track at any time?
>
> A. Yes, sir.
>
> Q. You didn't know when they were coming?
>
> A. No, sir.
>
> Q. Did you expect the train men to be looking out for you, or did you look out for the trains.
>
> A. We looked out for the trains." Record (print), page 127.

Shipman, another member of the section force, testified as follows:

> "Q. What were the instructions given to the men in regard to looking out for trains while at work on the track?
>
> A. To look out all the time, and if we see a train coming to set the car off. That is what he told the men.
>
> Q. Did you know that a train might come at any time?

A. Yes, sir." Record (print), pages 146-147. See also page 174.

The section men were likewise instructed that the engineman does not maintain a constant lookout ahead; that when necessary to signal a train to stop they must act on the assumption that the engineman was not looking out, and give the signal by torpedoes in addition to the red flag, and that it was incumbent upon them always to exercise constant vigilance to avoid being struck and injured by passing trains. Record (print), pages 173-174.

Track men are employed to keep the track in repair for the safe movement of trains, and the duty necessary devolves upon them to keep a constant lookout for their own safety. So far as section men are concerned, therefore, the train crew have a right to expect a clear track and the railway company is under no duty to anticipate the presence of a track man and of warning him of the approach of a train.

If the servants operating this train had actually discovered the deceased in a position of peril, and apparently unaware of his danger, the most elementary principles of law and humanity would have required that they should do all that the time would admit to avoid injuring him. But there was no evidence to bring this principle of law into application.

Respectfully submitted,

RANDOLPH HARRISON,
A. R. LONG,
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*Counsel for Petitioner.*

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IN THE

# Supreme Court of the United States

MARCH TERM, 1926.

No. 306

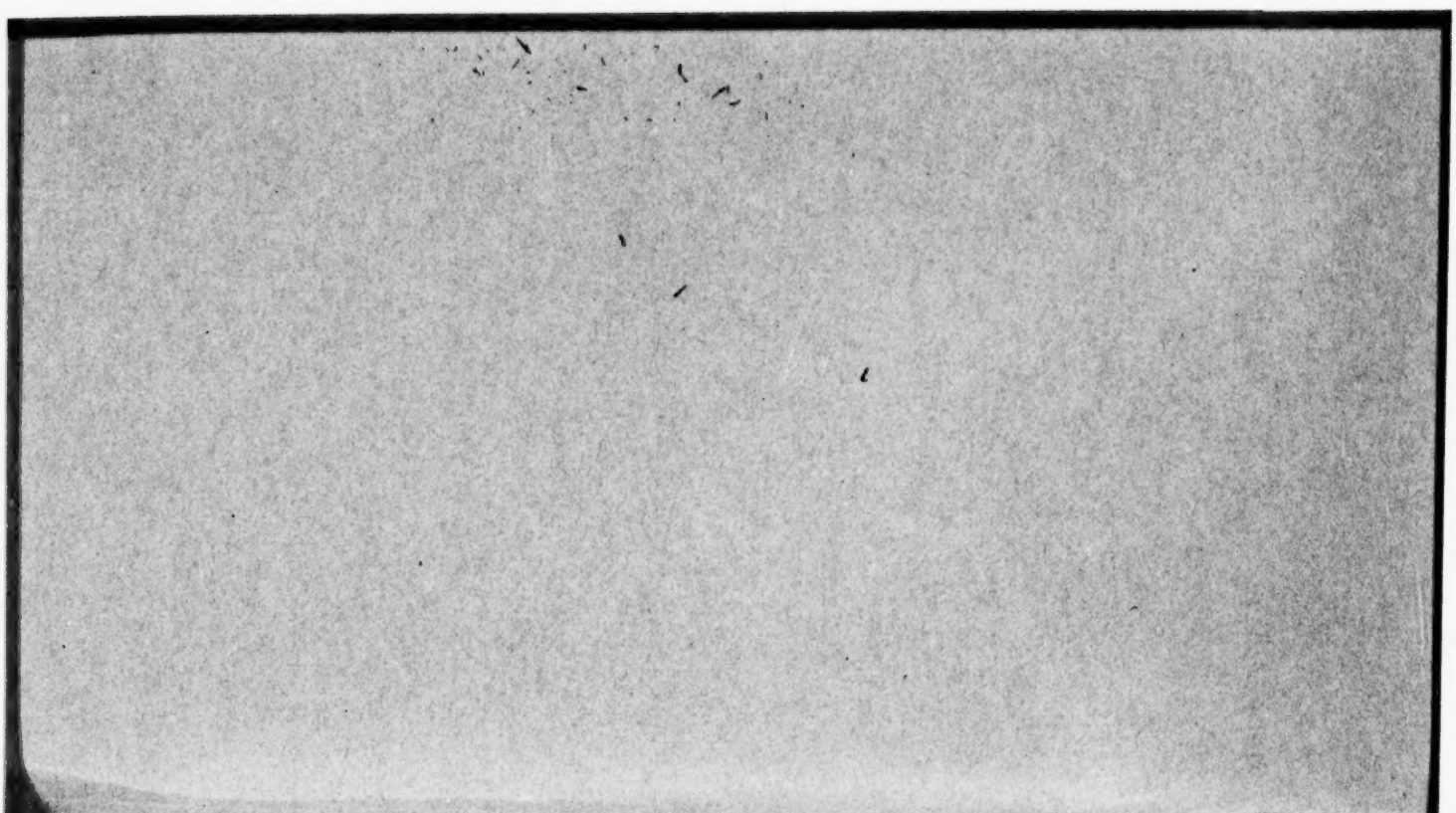
THE CHESAPEAKE & OHIO RAILWAY CO.,
PETITIONER,

vs.

ANNIE NIXON, ADMINISTRATRIX OF THE ESTATE OF SAM JOE NIXON, DECEASED.

## REPLY BRIEF OF ANNIE NIXON, ADMINISTRATRIX OF THE ESTATE OF SAM JOE NIXON, Deceased.

[illegible] PRINTING CO., INC., RICHMOND, VIRGINIA



IN THE

# Supreme Court of the United States

MARCH TERM, 1926.

No. 966.

THE CHESAPEAKE & OHIO RAILWAY CO.,
PETITIONER,

vs.

ANNIE NIXON, ADMINISTRATRIX OF THE ESTATE OF SAM JOE NIXON, DECEASED.

## REPLY BRIEF OF ANNIE NIXON, ADMINISTRATRIX OF THE ESTATE OF SAM JOE NIXON, Deceased.

The only specifications of error assigned by the petitioner are as follows:

1. The Supreme Court of Appeals of Virginia erred in affirming the action of the trial Court in refusing petitioner's instruction on the duty of maintaining a lookout for track men employed in interstate commerce.

2. The Supreme Court of Appeals of Virginia erred in affirming the action of the trial Court in refusing petitioner's instruction on the assumption of risks by track men employed in interstate commerce.

The instruction complained of and which was refused by the trial Court is as follows:

> "The Court instructs the jury that the employees of a railway company engaged in the maintenance and repair of a railroad track, whose business it is to keep the track in safe condition for the movement of trains, must maintain a lookout at all times for the approach of such trains and for their own safety, and the employees operating such

trains have the right to assume that the track employees will keep the track free from obstructions, and consequently they owe no duty to such track employees of maintaining a lookout for them or of warning them of the approach of the trains."

It is respectfully submitted that the Supreme Court of Appeals of Virginia did not err in affirming the action of the trial court in refusing the above instruction; because Nixon at the time he was killed was not "engaged in the maintenance and repair of a railroad track," but was a servant on his master's premises on his way to begin work, due to arrive at the starting point a reasonable time, to wit, fifteen (15) minutes before the hour of commencement, using for his transportation the railroad track and a tricycle belonging to the Company which he had the express leave, permission, allowance or license of the Company to use. He was therefore at the instant of the accident both a servant (and as to the mode of travelling) a licensee.

So far as his position on the track was concerned he might have been a clerk, station agent, or servant of any kind in the employment of the Company.

In addition the rules of the Company required the Engineman and fireman to keep a lookout ahead at all times and it was their failure to keep such lookout that caused the accident.

Transcript of Record, page 67.

C. J. GEYER, DIVISION ENGINEER, FOR THE C. & O. R. R. Co.

Cross-examined by Mr. Drysdale:

"Q. Now, what do you know about the duties of an engineer with respect to keeping a lookout?

A. The general rule in the rule book is that the engineer and fireman shall keep a lookout ahead.

Q. That is the general rule?

A. Which is in the rule book."

* * * * * * *

"Q. Now, I want to be sure that we understand this thoroughly, it is the duty of the engineer to keep a constant lookout ahead except as he is prevented from doing that by other imperative duties, in other words, duties of more importance, that is correct, isn't it?

A. Yes, sir, that is in the rule book."

* * * * * * *

Transcript of Record, page 73.

"Q. Now suppose the only object of the engineer was, not because his engine imperatively demanded this oil, but he wanted to put this oil in his engine, before the engine reached Gladstone rather than have it spilled at Gladstone, you wouldn't call that an imperative duty to keep him from looking out, would you?

A. If that was a fact I wouldn't say it was."

The second assignment of error relates to the trial Court's refusal to give the following instructions on the assumption of risk by track men employed in interstate commerce, this instruction which was refused by the trial court is as follows:

"The Court instructs the jury that an employee of a railway company in accepting employment as a section foreman thereon, assumes all the ordinary risks that are necessarily and normally incident to the occupation in which he engages, whether the employee is actually aware of such risks or not. And if the jury believe from the evidence that the railway company customarily ran its trains over its track at or near the point of the accident in question at any time in either direction, and without maintaining a lookout for track men at such times as the engineer and fireman were engaged in the performance of necessary duties about the engine, then they are instructed that the plaintiff's intestate likewise assumed the risk of danger from such cause, and the plaintiff cannot recover in this action."

It is submitted that the Supreme Court of Appeals of Virginia did not err in confirming the trial Court's refusal to give the above instruction for these reasons:

There was no evidence to show that the train crews habitually disobeyed the lookout rule and none to show that if they did Nixon was aware of it.

Nixon did not assume the risk of the negligence of his fellow servants the engineman and fireman of the train and the whole evidence showed beyond the peradventure of a doubt that it was their negligence in failing to keep a lookout that caused the accident resulting in the death of Nixon.

In its support of its specifications of error, numerous cases have been cited but it is respectfully submitted that the cases relied on by the petitioner are cases governing the liability of interstate carriers to their employees growing out of yard movements of their trains and engines and that the instant case should be governed by the principles announced by this Court in *Seaboard Air Line Railway* vs. *Beauregard Magdalene Koennecke*, 60 Law Ed. p. 324; 239 U. S. p. 352.

In the present case the evidence is undisputed, that the deceased was engaged in interstate commerce, that he was engaged in main line work, that the rules of his company required the constant lookout to be kept and as was said in the Koennecke case:

> "We see equally little ground for the contention that there was no evidence of negligence. It at least might have been found that Koennecke was killed by a train that had just come in and was backing into the yard, that the movement was not a yard movement, that it was on the main track, and that there was no lookout on the end of the train and no warning of its approach. In short, the jury might have found that the case was not that of an injury done by a switching engine known to be engaged upon its ordinary business in a yard, like *Aerkfetz* v. *Humphreys*, 145 U. S. 418, 36 L. Ed. 758, 12 Sup. Ct. Rep. 835, but one where the rules of the company and reasonable care required a lookout to be kept. It seems to us that it would have been impossible to take the case from the jury on the ground either that there was no negligence or that the deceased assumed the risk."

It would seem clearly that the question was one solely for the jury and that the judgment of the Supreme Court of Appeals of Virginia should be affirmed.

All which is respectfully submitted.

DUNCAN DRYSDALE,
AUBREY E. STRODE,
*Counsel for Annie Nixon, Administratrix of the Estate of Sam Joe Nixon, deceased.*

## ACKNOWLEDGMENT OF SERVICE OF BRIEF.

The undersigned hereby acknowledge legal service of the foregoing reply brief of Annie Nixon, Administratrix of the Estate of Sam Joe Nixon, Deceased, who is defendant in a writ of certiorari now pending in the Supreme Court of the United States.

Given under our hands this 22nd day of April, 1926.

RANDOLPH HARRISON,
A. R. LONG,
S. H. WILLIAMS,
*Counsel for Chesapeake & Ohio Railway Co.*